IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.903 OF 2006

Sanjay Madhav Athavale ...Petitioner

vs.

Gupta Enterprises and others ...Respondents

Mr.U.P.Warunjikar for the Petitioner
Mr.A.V.Anturkar with Mr.S.B.Deshmukh for Respondent No.1
Mr.S.R.Shinde, A.P.P. for State

CORAM: A.S.OKA,J.
DATE : AUGUST 21, 2006.

P.C.:

1. On 17th August 2006 the Petition was finally heard. The challenge in this Writ Petition under Article 227 of Constitution of India is to the Order dated 2nd March 2006 passed by the learned Judicial Magistrate (First Class), Khadaki Court, Pune. By the said order, the application made by the present Petitioner at Exh.76 has been rejected.

2. The first Respondent is a complainant in a private complaint filed for offences punishable under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as said Act of 1881) and section 420 of the Indian Penal Code. The Respondent Nos.2 to 4 are arraigned as accused persons in the said private complaint. The learned Magistrate issued process on the said complaint. The summons addressed to the second respondent was served on the Petitioner herein. In the application at exh.76 made by the Petitioner herein, it was contended that he was not personally served with any summons and process has not been issued against him. He stated that

he has been served with a summons addressed to the Respondent No.2. The prayer in the application was for seeking direction not to record the plea against the Applicant. The said application was contested by the first Respondent by filing a reply. The contention raised in the reply was that the Petitioner is a partner of the firm and is a signatory to the cheque. The learned Magistrate while passing the impugned order observed that it was premature to accept the contention of the first Respondent that the cheque in question bears the signature of the present Petitioner. The learned Magistrate observed that it was premature to decide the contentions raised by the present Petitioner.

3. The learned Counsel for the Petitioner submitted that the summons was received by the Petitioner as address of the first accused mentioned in the summons was of the Petitioner. He submitted that only a limited request was made in the Application that the plea of the Petitioner should not be recorded as he was not named as an accused. He submitted that there is non-application of mind on the part of the learned Magistrate.

4. Shri Anturkar appearing for the Respondent submitted that the first accused was a partnership firm and as the Petitioner was representing the partnership firm being its partner, his plea will have to be recorded. He invited my attention to section 141 of the said Act of 1881 and submitted that the first accused which is a partnership firm will have to be represented by its partner.

5. I have considered the submissions. In the complaint filed by the first Respondent, the address of the first accused is shown as "10, Swati Apartments, 2A/194, Azad Nagar, Kanpur 208 002." It appears that an application was made at Exh.61 by the first Respondent for sending the summons of the first accused at a new address which is described as under :

. Auto Parts Inc
C/O. Mr.Sanjay Madhav Athavale
No.5, Ankur Apartments,
128/4, Sanewadi Aundh,
Pune - 411 007.

6. Perusal of the complaint shows that no allegation has been made personally against the Petitioner in complaint. Even in the verification no allegation has been made against the Petitioner. It is not even alleged either in the complaint or in the verification that the Petitioner was incharge of and was responsible for the conduct of the business of the first accused.

7. The impugned order proceeds on erroneous assumption that the summons has been served to the present Petitioner in his capacity as the representative of the firm. It is obvious from the exh.61 and cause title of the complaint that the summons was not served to the Petitioner in his capacity as representative of the first accused-firm. The address of the first accused firm was given as c/o Sanjay Madhav Athawale. However, the learned Magistrate has observed in paragraph 3 of the impugned order that the summons was served on the

Petitioner in his capacity as representative of the firm. The said observation made by the learned Magistrate is factually incorrect. In my view, the learned Judge has committed a serious error by not considering the merits of the application. Considering the material on record as of today, the application made by the Petitioner at Exh.76 deserves to be allowed. The Petitioner is not an accused as of today. Even in the reply filed by the first Respondent to the Application at Exh.76, it is not contended that the plea of the Petitioner is required to be recorded in his capacity as a representative. Hence, impugned order deserves to be quashed and set aside. Application deserves to be allowed.

. Hence, I pass the following order :

i) Impugned order dated 2nd March 2006 passed by the learned Judicial Magistrate (First Class), Pune is quashed and set aside and the application at Exh.76 made by the Petitioner is allowed.

ii) All contentions on merits of the complaint are kept open. The question whether the Petitioner can represent the first accused-firm is also expressly kept open.

iii) Rule is made absolute in above terms.

JUDGE